SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE TOMOKO AKANE

I. INTRODUCTION

1. The Majority convicts Mr Al Hassan on a number of Counts and acquits him of others. Although I form part of the Majority in both cases with respect to the outcome, for the reasons outlined in the present opinion, I respectfully disagree with several issues discussed in the Trial Judgment. Pursuant to Article 74(5) of the Statute which provides, *inter alia*, that '[w]hen there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority', I hereby provide my views on these issues on which I am unable to agree with my colleagues.

2. In particular, while I form a Majority with Judge Mindua in declaring Mr Al Hassan not guilty of the crimes of rape, sexual slavery and forced marriage as an other inhumane act (Counts 8-12), I do so for different reasons. In particular, my reasons differ in relation to the crime of rape comprising acts committed by the *Hesbah* under Mohammed Moussa's tenure, in which Mr Al Hassan had no involvement. As I will further explain in the present opinion, I find that while Mr Al Hassan is charged under Article 25(3)(d) of the Statute in respect of these Counts, the crimes of rape, sexual slavery and forced marriage as an other inhumane act were not part of the common purpose shared by members of Ansar Dine/AQIM,[1] nor did Mr Al Hassan make any contribution to these crimes.[2] Further, in relation to the crimes against humanity of rape, sexual slavery and forced marriage (Counts 8-9 and 11), the evidence fails to demonstrate that the contextual elements of the crimes against humanity are satisfied.[3]

3. Although I form a Majority with Judge Prost in declaring Mr Al Hassan guilty under Counts 1-6 and 13-14, I am unable to join with respect to several underlying findings. In relation to the crime against humanity of torture, I respectfully disagree with my colleagues' interpretation of the 'lawful sanctions' clause.[4] While I join in finding that there was a crime against humanity of persecution for which Mr Al Hassan is criminally responsible, I am unable to concur with the scope of the crime. In particular, my view, which ultimately defines the scope of the conviction for this crime as Judge Mindua is of the view that the defence of duress is applicable, is that certain underlying acts that were taken into consideration by my colleagues should be excluded and a conviction can only

[1] *See* section II.A.1 below.
[2] *See* section II.A.2 below.
[3] *See* section II.B below.
[4] *See* section III below.

be entered with respect to persecution on religious grounds.[5] In relation to Mr Al Hassan's individual criminal responsibility, with respect, I disagree with the approach of making findings on alternative modes of liability even where a conviction is entered with respect to the primary mode of liability.[6] Further, while I join Judge Mindua in declaring Mr Al Hassan not criminally responsible for the war crime of sentencing without due process under Article 25(3)(c) of the Statute in relation to the nine incidents for which he drafted and signed police reports, I do so for different reasons.[7]

4. I note that Judge Mindua considers that Mr Al Hassan is not guilty of all counts on the basis of grounds excluding criminal responsibility (duress and mistake of law).[8] With respect, I disagree with this view. In my view, there is neither a factual nor legal basis that makes the defence of duress or mistake of law applicable to the present case.

5. Apart from these issues that are addressed in the present opinion, I have also appended several dissenting opinions by way of footnotes to the Trial Judgment *inter alia* where I am unable to concur with my colleagues' assessment of the evidence.[9]

6. One of the fundamental fair trial guarantees in proceedings before the Court is the right to confront a witness under Article 67(1)(e) of the Statute, which is reflected in Article 69(2) which stipulates, *inter alia*, that 'the testimony of a witness at trial shall be given in person'.[10] While this right is not without limitations, any exception to the principle of orality must be interpreted strictly and warrants a careful assessment to ensure that there is no prejudice to the accused.[11] It is in this context that the Appeals Chamber held that, while there is no legal impediment to the reliance on prior recorded testimony admitted pursuant to Rule 68(2) of the Rules to establish individual criminal acts, reliance on such evidence should not be prejudicial to or inconsistent with the rights of the accused and 'prior recorded testimony must not form the sole or decisive basis for the conviction for

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[5] *See* section IV below.
[6] *See* section IV below.
[7] *See* section V below.
[8] *See* Trial Judgment, section V.D; Opinion individuelle et partiellement dissidente du Juge Antoine Kesia-Mbe Mindua.
[9] *See* notably footnotes 2333 (on the two young men), 2628 (on Dédéou Maiga), 2790, 2792-2793 - and 2810-2811 (on Azahara Abdou (P-1134)), 3279 and 3289 (on P-1162), 3298, 3402, 3417, 3429, 3434, 3438, and 3442 (on the Islamic Court judgments). *See also* notably footnotes 4462, 4539, 4547, 4551, 4861 and 4987 of the Trial Judgment for associated disagreements on the legal findings.
[10] *See also* *Al Hassan* OA4 Judgment, paras 75-77.
[11] *See similarly* *Al Hassan* OA4 Judgment, paras 79-84.

a particular crime as such'.[12] The stringency that is required in the Trial Chamber's assessment of evidence applies with even greater force where the evidence in question was not given in court nor introduced pursuant to Rule 68 of the Rules. That the Chamber may freely assess all evidence submitted, pursuant to Rule 63(2) of the Rules, does not mean that the Chamber need not pay due regard to the type of evidence, as reflected in the aforementioned appellate jurisprudence.[13] It is evident that what is required is a case-by-case assessment giving appropriate attention to, *inter alia*, the type of evidence and the fact that it purports to support, together with any corroborating evidence. However, the need to conduct a holistic and evidence-specific assessment cannot serve as a loophole to enter findings on key facts for a conviction on the basis of evidence with insufficient probative value or in a manner that is prejudicial to the accused.

7. It is against this background that I have departed from my colleagues' findings concerning Azahara Abdou (P-1134). In my view, to enter factual findings concerning rape, a material fact for the charged crimes, solely on the basis of journalistic work products, would contravene the fundamental principles of evidence as outlined above and falls short of satisfying the beyond reasonable doubt standard.[14] The other disagreements on the assessment of evidence, as articulated in footnotes in the Trial Judgment, similarly derive from the abovementioned principles concerning the assessment of the evidence.

II. DISAGREEMENTS RELATED TO ACTS COMMITTED BY MEMBERS OF THE *HESBAH* UNDER MOHAMMED MOUSSA AND RELATED TO FORCED MARRIAGE AND ASSOCIATED ACTS OF RAPE AND SEXUAL SLAVERY

8. Although I form a Majority with Judge Mindua in declaring Mr Al Hassan not guilty in relation to acts committed by members of the *Hesbah* under Mohammed Moussa charged under Counts 2, 4-6 and 11-12, and not guilty in relation to forced marriage and associated acts of rape and sexual slavery charged under Counts 8-12, I do so for different reasons.

[12] *See* *Ntaganda* Appeal Judgment, paras 629-630.
[13] *See contra* footnote 2811 of the Trial Judgment.
[14] *See* footnotes 2792-2793 and 2810-2811 of the Trial Judgment for a more detailed analysis on the relevant evidence. *See also* footnote 2817 of the Trial Judgment on the difference with P-0570's prior recorded testimony.

A. Mr Al Hassan's individual criminal responsibility under Article 25(3)(d) of the Statute

9. For reasons explained below, I depart from my colleagues' findings in relation to the common purpose and contribution requirements in relation to certain crimes and incidents for which Mr Al Hassan is charged under Article 25(3)(d).

10. I am generally in agreement with the applicable law on Article 25(3)(d) as set out in the Trial Judgment,[15] subject to discrete points discussed in the present section. However, I am unable to join my colleagues' position that the Terrorist Bombing Convention must be taken into account in the interpretation of Article 25(3)(d) 'using the ordinary meaning of the language employed by the drafters'.[16] In my view, such a finding erroneously conflates the need to give terms of the treaty their ordinary meaning (textual interpretation) and the role of the *travaux préparatoires*, the latter being merely a supplementary means of interpretation.[17] In my view, reference to the discussions concerning the Terrorist Bombing Convention in the *travaux préparatoires* is not justified nor necessary, as it does not provide any meaningful guidance to the Chamber.

1. The scope of Ansar Dine/AQIM's common purpose within the meaning of Article 25(3)(d) of the Statute

11. I have joined my colleagues in finding that between 2 April 2012 and 29 January 2013, Ansar Dine/AQIM acted as a 'group' with a common purpose within the meaning of Article 25(3)(d) of the Statute, namely to impose and implement their interpretation of *Sharia* and to control Timbuktu and its residents for this purpose.[18]

12. I am also in agreement with my colleagues that several of the crimes for which Mr Al Hassan is charged formed part of Ansar Dine/AQIM's common purpose. However, for reasons developed below, I am of the view that the following crimes do not form part of the common purpose: (i) acts of violence and other forms of ill-treatment of women by the *Hesbah* under Mohammed Moussa constituting crimes charged under Counts 2

[15] *See* paragraphs 1229-1248 of the Trial Judgment.
[16] *See* paragraph 1231 of the Trial Judgment.
[17] *See* Article 32 of the VCLT. In the specific context before the Court, an ambiguity in the plain meaning of the text concerning the crimes or the modes of liability must be resolved in favour of the accused. *See similarly* Judge Christine Van den Wyngaert Minority Opinion in *Katanga* Trial Judgment, para. 18.
[18] *See* paragraph 1620 of the Trial Judgment.

and 4-6; (ii) other passing of sentences without previous judgment by members of the *Hesbah* under Mohammed Moussa constituting crimes charged under Count 6; (iii) acts of rape in detention constituting crimes charged under Counts 11 and 12; and (iv) forced marriage and associated acts of sexual violence constituting crimes charged under Counts 8-12.

13. I am of the view that in circumstances, such as the case at hand, where the Chamber is called upon to determine whether there was a common purpose covering several months shared by a group exercising control over an area, a careful analysis must be carried out with respect to each of the charged crimes, having due regard to actions taken over the course of time. Indeed, and as explained below, having analysed the actions taken by the Ansar Dine/AQIM leadership during the control of Timbuktu, I am of the view that several of the crimes for which Mr Al Hassan is charged were not committed pursuant to a common purpose shared by Ansar Dine/AQIM's members.

i. Arrest and detention of women by the Hesbah under Mohammed Moussa charged under Counts 2 and 4-6

14. I recall that the acts of violence and other forms of ill-treatment committed against Fadimata Mint Lilli (P-0547), P-0570, P-0636, Azahara Abdou (P-1134), Salamata Warnamougrez (P-1710) and Hady Aguissa (P-1711) by the *Hesbah* under Mohammed Moussa's leadership are charged under Counts 2 and 4-6. These victims were arrested and subject to violence and other forms of ill-treatment as a punishment for allegedly not wearing appropriate clothing in public.[19] The Chamber found that these crimes were committed after Mohammed Moussa became the emir of the *Hesbah*, *i.e.* after early September 2012.

15. The Chamber found that notwithstanding that *ta'zir* punishments could initially be imposed by any member of Ansar Dine/AQIM,[20] the leadership eventually attempted to curtail the number of authorities allowed to impose punishments, as well as the way they should be administered.[21] Notably, on 15 August 2012, following complaints from the population, including the events that led to the removal of Adama as emir of the Police, Abou Zeid issued instructions addressed to 'the police, Hisba and all soldiers', in which

[19] *See* paragraphs 858, 863, 875, 891 and 903 of the Trial Judgment.
[20] *See* paragraph 664 of the Trial Judgment.
[21] *See* paragraphs 666 and 669 of the Trial Judgment.

he ordered that '*[t]a'zir* will only be applied at police and Hisba stations, 'after an "adequate investigation"'. The instructions also dictated that '[w]hen an obvious violation is committed, they are to be made aware of the relevant *Sharia* rule and an attempt must be made to rectify the violation, if possible. It is an obligation to avoid acting against people's interests unless it is absolutely necessary'. Specifically in relation to women who were unveiled in public, the instructions stated that: (a) if she was accompanied by a man, then the man was to be asked to impose the wearing of the veil upon her. She should also be informed of the consequences of failing to comply or repeating the act in the future; (b) if the woman was on her own or accompanied by other women, then she was to be informed of the matter in accordance with the stipulations of the *Sharia*, in addition to the consequences of repeating this act; (c) in the case of repeated resistance, her guardian was to be notified and if she reoffended afterwards, then the *ta'zir* was to be applied.[22] Further, around November or December 2012, following further complaints from the population, the *Hesbah* and the Islamic Police were instructed to no longer punish offenders unless ordered by the Islamic Court.[23]

16. The 'punishments' imposed on Fadimata Mint Lilli (P-0547), P-0570, P-0636, Azahara Abdou (P-1134), Salamata Warnamougrez (P-1710) and Hady Aguissa (P-1711) by members of the *Hesbah* under Mohammed Moussa contradicted the instructions issued on 15 August 2012 and around November or December 2012. Although the six victims were arrested for allegedly failing to cover up properly, they were punished without following the procedure set out in the instructions of 15 August 2012. Furthermore, although the six victims may have been subject to acts of violence for alleged breaches of the dress code after the instructions of November or December 2012,[24] no evidence has been laid before the Chamber indicating that Islamic Court judgments were issued prior to the victims' respective 'punishments'. Moreover, four of the victims were subject

[22] Abou Zeid's Instructions MLI-OTP-0001-7193, translation MLI-OTP-0077-2366; MLI-OTP-0001-7194, translation MLI-OTP-0077-2369.
[23] *See* paragraph 669 of the Trial Judgment.
[24] I note that the incidents concerning P-1134 and P-0547 occurred in late November and around November or December 2012, respectively. The incidents concerning P-0570 and P-0636 occurred 'around or after September 2012' and 'around October to November 2012 inclusive' and accordingly it cannot be concluded beyond reasonable doubt that these four incidents occurred before the issuance of the instructions around November or December 2012. I consider that the same reasoning also applies to Salamata Warnamougrez (P-1710) and Hady Aguissa (P-1711), who were arrested sometime between early September 2012 and late December 2012, and to P-1712, for whom the exact time period of the victimisation is not specified.

to rape in detention which, for reasons outlined further below, I consider outside the common purpose.

17. In this regard, I also place weight on the reaction of members of Ansar Dine/AQIM to the actions of Mohammed Moussa comprising abuses and subsequent detention of women for not respecting the dress code. Notably, the emirs of Ansar Dine/AQIM advised Mohammed Moussa that the manner in which he detained women at the BMS did not meet the necessary criteria or standards.[25] Ansar Dine/AQIM members filed complaints with their respective emirs or with Abou Zeid about Mohammed Moussa concerning the imprisonment of women.[26] As P-0065 testified, the judges of the Islamic Court and 'most of the actual leaders of [Timbuktu]' preferred the approach of Al Mahdi and members of AQIM were not content with the actions of Mohammed Moussa.[27] Indeed, the detention of women for alleged breaches of the dress code by Mohammed Moussa was clearly at odds with Ansar Dine/AQIM's approach to avoid over-provoking the population of Timbuktu.[28] In describing the actions of Mohammed Moussa, Mr Al Hassan stated that the imprisonment of women was not part of Mohammed Moussa's official functions[29] and was contrary to *Sharia*. [30] The submitted evidence does not demonstrate that the *Hesbah* under Al Mahdi or other institutions such as the Islamic Police detained women in prison for breaching the dress code imposed by Ansar Dine/AQIM. Accordingly, I am of the view that, as reflected in P-0065's evidence, 'Mohammed Moussa's views and approach did not embody the views of other members of Ansar Dine'.[31]

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[25] *See* paragraph 541 of the Trial Judgment. I note that in the relevant part, the Chamber concludes that 'In principle, Mohammed Moussa was allowed to imprison women in accordance with their interpretation of *Sharia*'. While I do not believe that this is *per se* incorrect, I also note that in the relevant part, P-0150 explained that this was the general principle in *Sharia* and that 'it is possible to imprison women if it is proven that they committed something that requires imprisonment' (P-0150: T-094, pp. 14, 17.) In my view, P-0150's evidence should not be understood as meaning that the leadership of Ansar Dine/AQIM advised Mohammed Moussa that women could be detained for not following the dress code. For the same reason, I am also unable to agree with my colleagues' characterisation of the facts that the emirs advised Mohammed Moussa 'in authorising Mohammed Moussa to detain women' (*see* paragraph 1652 of the Trial Judgment).

[26] *See* paragraph 539 of the Trial Judgment.

[27] *See* paragraph 540 of the Trial Judgment.

[28] *See* paragraphs 540 and 1631 of the Trial Judgment. With respect, I do not consider well founded my colleagues' assertion that these acts were 'all directed at increasing the effectiveness of the repression system put into place by Ansar Dine/AQIM' (*see* paragraph 1634 of the Trial Judgment). Further, my colleagues' position that the critical reaction against Mohammed Moussa was generated solely out of concerns of potential discord with the population (*see* paragraph 1635 of the Trial Judgment) ignores the fact that it was not just the leadership but also ordinary members of Ansar Dine who complained about Mohammed Moussa's actions.

[29] Mr Al Hassan's statement, MLI-OTP-0051-1124, at 1145.

[30] Mr Al Hassan's statement, MLI-OTP-0051-1155, at 1175; Mr Al Hassan's statement, MLI-OTP-0051-1124, at 1150.

[31] *See* paragraph 539 of the Trial Judgment.

18. Indeed, while no immediate or meaningful change could be seen, Mohammed Moussa was removed from the position of the emir of the *Hesbah* following the complaints from Ansar Dine/AQIM members and the population, around the middle or end of December 2012.[32]

19. In this context, I also recall that, at the relevant time, the population would also complain about Mohammed Moussa's extremism to members of Ansar Dine/AQIM, including to Adama and Mr Al Hassan from the Islamic Police and Talha from the Security Battalion.[33] While not determinative, I consider that the fact that the civilian population raised complaints with other institutions set up by Ansar Dine/AQIM in this manner reflects that the detention of women was perceived to be a problem specific to the *Hesbah* under Mohammed Moussa, rather than a result of a concerted action across Ansar Dine/AQIM.

20. As set out above, I am of the view that the abuses committed by Mohammed Moussa did not embody the views of other members of Ansar Dine/AQIM. Rather, the acts of violence and other forms of ill-treatment of women caused by the *Hesbah* were carried out under the sole authority of Mohammed Moussa, the then emir of the *Hesbah*. In other words, the aforementioned acts were not perpetrated as part of a 'purpose' that was common to members of Ansar Dine/AQIM.

21. My colleagues downplay the significance of Abou Zeid's instructions by finding that there is no evidence as to how much the instructions were followed, referring also to P-0150's testimony that 'there was no total compliance by the members with these instructions'.[34] However, I note that immediately before the relevant part of his testimony, P-0150 also stated that as a result of the instructions, 'significant change happened in the *modus operandi* of the group throughout the concerned period'.[35] This clearly implies that in general there was, as a result of the instructions, a significant change in the manner in which members of Ansar Dine/AQIM meted out punishments. To require evidence of 'total compliance' is unreasonable and unnecessary, as lack of 'total compliance' with rules do not *per se* imply that the underlying rules are invalid.[36] What is relevant is that

[32] *See* paragraph 543 of the Trial Judgment. *See also* Defence Final Brief, para. 47.
[33] *See* paragraph 538 of the Trial Judgment.
[34] *See* paragraph 1633 of the Trial Judgment.
[35] P-0150: T-117, p. 37.
[36] *See generally* J. Crawford, *Chance, Order, Change: The Course of International Law* (2014), p. 40.

the leadership took action aimed at restricting the manner in which Ansar Dine/AQIM's rules and prohibitions were to be enforced, which, in my view, reflects the contours of the common purpose in the present case.

22. My colleagues also note that the fact that some members of the groups did not follow all of the specific instructions issued as to the procedure with respect to punishment does not mean that their conduct falls outside the common purpose.[37] I must emphasise that, as a general matter, it is not my view that the slightest of deviations in procedure is cause to exclude an act from the scope of the common purpose. However, there need always be a case-by-case analysis as to whether the failure to follow the relevant procedure negates the existence of a common purpose. In the case at hand, the clear shared intention of Ansar Dine/AQIM following the issuance of the aforementioned instructions in November or December 2012 was that punishments could only be imposed by seizing the Islamic Court. Had members of the *Hesbah* followed these instructions, the crimes in question, namely the detention of women for the breach of the dress code and subsequent acts of violence, would not have occurred. Equally, had members of the *Hesbah* followed the instructions of August 2012, the crimes in question would similarly not have occurred.[38] I specifically note that no evidence before the Chamber suggests that the Islamic Police would have violated these instructions on the detention of women. Those acts of the *Hesbah* that contravened the instructions are, accordingly, not part of the concerted action of Ansar Dine/AQIM. Respectfully, I also disagree with my colleagues that these acts of the *Hesbah* under Mohammed Moussa shared 'key characteristics', namely that these were 'the same types of punishments, imposed for the same category of perceived violations of measures, carried out by Mohammed Moussa in his capacity as head of *Hesbah* and/or by other *Hesbah* members in their official capacity, all in aid of the common goal of imposing their version of *Sharia*'.[39] I note that the evidence does not demonstrate that women were imprisoned in dire conditions prior to Mohammed Moussa's tenure as the emir of the *Hesbah* for violating the dress code. Quite the contrary, Mr Al Hassan stated, in addition to the fact that these acts were not part of the *Hesbah*'s functions and contrary to *Sharia*, that '*[l]es jeunes qui étaient dans la Hesbah et la police c'est la première fois qu'ils voient une femme…des femmes emprisonnées comme ça... de*

[37] *See* paragraph 1634 of the Trial Judgment.
[38] In this regard, P-0150 testified that the infliction of a *ta'zir* was authorised only after the proper procedural steps were taken. *See* P-0150: T-095, p. 40.
[39] *See* paragraphs 1635-1636 of the Trial Judgment.

cette façon'.[40] To hold that there were 'key characteristics' in these circumstances is akin to holding that *any act done in the name of enforcing Ansar Dine/AQIM's rules and prohibitions* would automatically form part of the common purpose. I am of the view that such an interpretation is untenably expansive.

23. Accordingly, I am of the view that the acts of violence and other forms of ill-treatment of women by the *Hesbah* under Mohammed Moussa, constituting crimes charged under Counts 2 and 4-6, did not form part of Ansar Dine/AQIM's common purpose.

24. For these reasons, I consider that the incidents concerning Fadimata Mint Lilli (P-0547), P-0570, P-0636, Azahara Abdou (P-1134), Salamata Warnamougrez (P-1710), Hady Aguissa (P-1711) and P-1712,[41] under Counts 2 and 4-6, fall outside the scope of the common purpose.

ii. Rape in detention charged under Counts 11 and 12

25. The Chamber found that Fadimata Mint Lilli (P-0547), P-0570, P-0636 and, by Majority,[42] Azahara Abdou (P-1134), were victims of rape by members of Ansar Dine/AQIM. I respectfully disagree with my colleagues that these crimes form part of the common purpose. As I am of the view that the detention of Fadimata Mint Lilli (P-0547), P-0570, P-0636, and Azahara Abdou (P-1134) falls outside the common purpose of Ansar Dine/AQIM,[43] it follows that the rape in detention of these four victims was also not part of the common purpose. However, even if the detention of the four victims was part of the common purpose, it is my opinion that their rape in detention would remain outside the common purpose of Ansar Dine/AQIM.

26. As a matter of law, I respectfully disagree with my colleagues' approach of using 'ordinary course of events' as the relevant standard in order to advance an expansionist interpretation of the common purpose. In relation to the rape in detention, my colleagues conclude that they were part of the common purpose on the basis that the 'members of Ansar Dine/AQIM knew that these acts of rape would be perpetrated against detained

[40] Mr Al Hassan's statement MLI-OTP-0051-1155, at 1158.
[41] As the exact timing of P-1712's victimisation is unknown, I consider that P-1712's incident also falls outside the scope of Ansar Dine/AQIM's common purpose for reasons set out in the present section, as such an inference is the most favourable to the accused.
[42] For reasons mentioned at footnote 2811 of the Trial Judgment, I am unable to join my colleagues in finding that Azahara Abdou (P-1134) was a victim of rape.
[43] *See* paragraph 24 above.

women in the ordinary course of events'.[44] In my view, my colleagues erroneously conflates the standard applicable in relation to the mental element under Article 30(2)(b) and that applicable to the common purpose, the latter being an objective requirement for the mode of liability under Article 25(3)(d) of the Statute.[45] However, in any event, I am of the view that the charged rape in detention would not have occurred in the ordinary course of events.

27. I recall that common purpose under Article 25(3)(d) of the Statute must either be to commit a crime within the jurisdiction of the Court or involve the commission of such a crime. In the latter instance, which is the case in the present instance, what must be established is that the crime or crimes committed were *part of the common purpose*. In carrying out this assessment, I am of the view that the Chamber must carefully analyse the link of the individual crimes to the common purpose, looking *inter alia* at the possible motive of the perpetrators of the crimes,[46] and exclude any unrelated or opportunistic acts.[47]

28. In the case at hand, I am of the view that the Prosecution failed to sufficiently explain how these acts of rape were linked to the dissemination of Ansar Dine/AQIM's ideology or their application of their conception of *Sharia* in order to control Timbuktu in a manner that matched their ideology.[48] There is no evidence in the present case suggesting that the rape in detention were committed to further the common purpose as defined above, as opposed to opportunistic crimes committed by the individual perpetrators of these crimes.[49] To the contrary, the official position of Ansar Dine/AQIM was that extramarital sexual intercourse was prohibited[50] and new recruits to Ansar Dine/AQIM were informed

[44] *See* paragraph 1655 of the Trial Judgment.
[45] *See* *Mbarushimana* Confirmation Decision, para. 69; *Ruto et al.* Confirmation Decision, para. 351; *Muthaura et al.* Summons Decision, para. 47. *See also* *Katanga* Trial Judgment, para. 1617.
[46] *See similarly* *Limaj et al.* Trial Judgment, para. 668; *Limaj et al.* Appeal Judgment, paras 108-110. This is not to suggest that motive is a requirement of all crimes or that it is a general element of criminal liability. Motive is however a relevant factor in assessing whether particular acts were opportunistic in nature or were part of a concerted action by a group, in the context of Article 25(3)(d) of the Statute.
[47] *See* paragraph 1237 of the Trial Judgment.
[48] *See* Prosecution Final Brief, paras 423, 425.
[49] In this regard, I respectfully disagree with my colleagues' position as I am not convinced that the dire conditions at the ATM room of the BMS is any proof that the acts of rape committed therein were part of the common purpose (*see contra* paragraph 1648 of the Trial Judgment). Rather, I note that Mohammed Moussa was advised that the conditions under which he was detaining people was not in line with the applicable standards (*see* paragraph 541 of the Trial Judgment).
[50] *See* paragraph 677 of the Trial Judgment.

accordingly during their training.[51] The Prosecution itself has previously argued that the rape in detention 'did not fit within the proclaimed ideology or the rules imposed by the Organisation in Timbuktu'.[52]

29. When asked if he was aware of a shared understanding within Ansar Dine/AQIM to commit rape through the application of the *Sharia*, P-0150, a key insider witness, answered in the negative and stated that '[t]here was no plan to rape'.[53] P-0570, a victim of rape, testified that '*[l]es chefs n'étaient pas au courant. […] Ils le faisaient en cachette […] ils ne pouvaient le faire aux yeux de tous, ce serait mal vu*'.[54]

30. I recall in particular that when a member of the Islamic Police raped a woman, the Islamic Police carried out investigations, after which the perpetrator was detained and sentenced by the Islamic Court to 100 lashes and banishment.[55] I also note that all of the charged incidents of rape whilst in detention concern acts that were committed by individual members of the *Hesbah* under Mohammed Moussa or Mohammed Moussa himself, whose approach did not embody the views of other members of Ansar Dine/AQIM.[56] In the absence of further evidence in support, it cannot be established that Ansar Dine/AQIM's members shared a common purpose to inflict rape on detainees.

31. I also respectfully disagree with my colleagues' finding that there was a pattern between the instances of rape in detention.[57] In my view, the four charged incidents of rape in

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[51] *See* footnote 1117 of the Trial Judgment, *referring to* D-0529: T-189, pp. 7-8, 48. *See also* Defence Final Brief, para. 53.
[52] Prosecution Trial Brief, para. 256. *See also* Defence Final Brief, para. 17.
[53] P-0150: T-105, p. 12. *See also* P-0150: T-119, pp. 44-45 (testifying that Mr Al Hassan cannot conceivably carry out what is called 'rape').
[54] P-0570's statement MLI-OTP-0049-0047-R05, at 0056, para. 38.
[55] *See* paragraphs 678-684 of the Trial Judgment. On my colleagues' argument dismissing the relevance of this incident (*see* paragraph 1656 of the Trial Judgment), *see* paragraph below.
[56] *See* paragraphs 17 and 20 above. In this regard, my colleagues find, *inter alia*, that 'specific complaints about the circumstances of detention when Mohammed Moussa was in charge of the *Hesbah* were brought to the attention of Abou Zeid and other emirs, including with respect to assaults on female detainees. Regarding the nature of these assaults, P-0150 explained that women complained to the Crisis Committee about what they referred to as 'sexual harassment'' (*see* paragraph 1652 of the Trial Judgment, *referring to* P-0150: T-120, p. 13). In my view, the fact that complaints were received, and therefore there was an awareness about the actions of Mohammed Moussa does not *per se* mean that his acts would be part of the concerted actions of Ansar Dine/AQIM. In any event, I disagree with my colleagues' usage of P-0150's evidence. The same witness, P-0150, clearly explained that he distinguishes 'sexual harassment' and acts of rape, and that he had only heard allegations of the former in relation to Mohammed Moussa (P-0150: T-112, p. 71). This notwithstanding, my colleagues rely on P-0150's evidence to substantiate a finding that the leadership received allegations of rape.
[57] *See* paragraph 1651 of the Trial Judgment.

detention are insufficient to make such a broad finding, considering in particular that the elements forming said 'pattern' are nothing but general.[58]

32. My colleagues also aver that 'the Chamber was not presented with evidence of any general intervention of Ansar Dine/AQIM's leadership to give directions regarding conditions of detention or to regulate or monitor what went on' and notes that Abou Zeid did not provide any instructions as to what should follow in terms of the conditions for the detention with respect to women.[59] I note that the instructions of August 2012 were issued before Mohammed Moussa became the emir of the *Hesbah* in early September 2012 and the evidence does not demonstrate that women were detained in dire conditions prior to Mohammed Moussa's tenure. Accordingly, the fact that the August instructions contain no references to the detention conditions of women is no basis for a negative inference, in light of the chronology of events. In addition, when faced with the actions of Mohammed Moussa and members of the *Hesbah*, the leadership did express their opinion that such detention conditions were not acceptable.[60] Further, the fact that rape was perpetrated in a coercive environment[61] does not *per se* bring those acts of rape within a group's common purpose.[62]

33. For these reasons, I consider that the acts of rape committed against Fadimata Mint Lilli (P-0547), P-0570, P-0636 and Azahara Abdou (P-1134) whilst detained by the *Hesbah* under Mohammed Moussa, charged under Counts 11 and 12, do not form part of the common purpose.

[58] Notably, since the Chamber itself found that members of Ansar Dine/AQIM generally carried weapons, I fail to see how the use of weapons would be a distinguishing factor establishing a pattern. While my colleagues also refer to the involvement of multiple men, this is not true for all cases, even within the scarce sample of the four charged incidents. In addition, the elements for the crime of rape requires that there be a use of force, threat of force, or coercion. To says that the use of 'threats' constitute an element establishing a pattern within the acts of rape seems unnecessary, as such threats are but the element of the crime of rape. To say that there is a 'pattern' amongst these acts of rape on the basis of these general factors is akin to saying that there is a pattern between several cases of murder as the victims were all killed with a weapon during hostilities. Respectfully, I am of the view that this falls short of constituting a 'pattern', and even if it does, it certainly has no meaning in the context of Article 25(3)(d).
[59] *See* paragraph 1654 of the Trial Judgment.
[60] *See* paragraph 541 of the Trial Judgment.
[61] *See* paragraph 1651 of the Trial Judgment.
[62] The *Katanga* Trial Chamber found that although the acts of rape and enslavement, carried out in the context of a military operation, 'formed an integral part of the militia's design to attack' the civilian population, those acts of rape still fell outside the scope of the common purpose. *See* *Katanga* Trial Judgment, paras 1663-1664.

iii. Forced marriage and associated acts of rape and sexual slavery charged under Counts 8-12

34. The Chamber found that P-0520, P-0538, P-0602, P-0610 and, by Majority,[63] P-1162, were victims of rape and/or sexual slavery by members of Ansar Dine/AQIM. I respectfully disagree with my colleagues that these crimes form part of the common purpose. The Chamber has unanimously entered into factual findings concerning the '*jihadi* marriages', *i.e.* marriages between members of Ansar Dine/AQIM and women from the local population.[64] I am in agreement with my colleagues that Ansar Dine/AQIM encouraged and facilitated marriages with locals during its control of Timbuktu, as marriage in general was seen as a means to gain influence amongst the local population and disseminate the groups' ideology.[65] However, with respect, I am unable to join my colleagues in the inferences they draw from these facts in concluding that members of Ansar Dine/AQIM acted with a common purpose that included the crime of forced marriages.

35. At the outset, for reasons mentioned above, I respectfully disagree, as a matter of law, with the use of 'ordinary course of events' to expand the scope of the common purpose.[66] However, in any event, I am of the view that the charged forced marriages would not have occurred in the ordinary course of events.

36. With respect, I am unable to concur with my colleagues' finding that *jihadi* marriages 'facilitated and empowered members of Ansar Dine/AQIM to forcibly marry women, including by using threats and harassment'.[67] In my view, there is no evidence presented before the Chamber that allows a link to be established between actions of Ansar Dine/AQIM concerning *jihadi* marriages and the charged forced marriages. Importantly, and as noted by the Chamber in the relevant factual findings, *jihadi* marriages refers to marriages between members of Ansar Dine/AQIM and women from the local population, irrespective of the individual circumstances concerning each marriage,[68] and thus cannot be equated with forced marriages.

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[63] For reasons mentioned at footnotes 3279, 3289 of the Trial Judgment, I am unable to join my colleagues in finding that P-1162 was a victim of forced marriage and associated acts of sexual slavery.
[64] *See* section III-C-3 of the Trial Judgment.
[65] *See* paragraph 1640 of the Trial Judgment.
[66] *See* paragraph 26 above. *See contra* paragraph 1645 of the Trial Judgment.
[67] *See* paragraph 1645 of the Trial Judgment.
[68] *See* footnotes 1308 and 1323 of the Trial Judgment.

37. The interpretation advanced by my colleagues, in my view, fails to sufficiently explain why the involvement of members of Ansar Dine/AQIM in *jihadi* marriages facilitated the charged forced marriages. To the contrary, in my view, the use of intermediaries, who were usually locals with influence due to their role and status, by Ansar Dine/AQIM reflects the groups' intention to enter into marriages through negotiations, rather than through the use of force. The evidence indeed reflects that marriage proposals, where members of Ansar Dine/AQIM acted as intermediaries, were on occasion rejected, including in one instance where Mr Al Hassan accompanied the Ansar Dine/AQIM member who wanted to get married.[69] Indeed, I consider that the means employed by Ansar Dine/AQIM to facilitate marriages, such as the use of intermediaries and the provision of financial assistance, was aimed at avoiding instances of forced marriages, by involving interlocutors and ensuring that members of Ansar Dine/AQIM had sufficient means to enter into marriages through the formal procedure. I also note that in the context of '*jihadi* marriages' well-known and influential individuals acted as intermediaries;[70] however the evidence does not demonstrate that this was the case in the charged forced marriages.

38. I also note that, if one of the purposes behind Ansar Dine/AQIM facilitating marriages was to spread its ideology and gain influence,[71] using force and sexual violence appears to be clearly counterproductive to said purpose.

39. P-0150, an insider witness who the Chamber found particularly credible and reliable, including on the topic of marriages, testified that while pressure existed, 'as to direct compulsion, that never occurred'.[72] This shows that even senior members of Ansar Dine/AQIM, such as P-0150, were of the view that there were no marriages involving 'direct compulsion'. In these circumstances, I find it implausible that ordinary members of Ansar Dine/AQIM had any awareness that the charged forced marriages would occur in the ordinary course of events. I therefore disagree that the members of Ansar

[69] *See* paragraph 502 of the Trial Judgment.
[70] *See* paragraphs 497-502 of the Trial Judgment.
[71] *See* paragraph 493 of the Trial Judgment.
[72] P-0150: T-113, p. 30.

Dine/AQIM acted with a common purpose, which included the charged forced marriages,[73] occurring in the ordinary course of events.

40. For these reasons, I consider that the forced marriages and associated acts of rape and/or sexual slavery committed against P-0520, P-0538, P-0602, P-0610 and P-1162, charged under Counts 8-12, do not form part of the common purpose.

2. Mr Al Hassan's contribution to the crimes

i. Mr Al Hassan's contribution to the arrest and detention of women by the Hesbah under Mohammed Moussa charged under Counts 2 and 4-6

41. For reasons set out above, I consider that the detention of women by the *Hesbah* under Mohammed Moussa falls outside of the common purpose of Ansar Dine/AQIM.[74] Further, I respectfully disagree with my colleagues' findings that Mr Al Hassan contributed to this crime, with the requisite mental element, within the meaning of Article 25(3)(d) of the Statute.

42. My colleagues do not draw a distinction between the detention of women constituting crimes under Counts 2 and 4-6 and other acts charged under the same counts. I am unable to concur with this approach. The acts charged under Counts 2 and 4-6 vary in terms of the identity of the perpetrators and the context in which they were committed. In particular, the detention of women by the *Hesbah* under Mohammed Moussa is different in that the Islamic Police, to which Mr Al Hassan belonged, had no involvement in the imposition of these punishments, contrary to the other punishments under consideration. In my view, my colleagues blur the distinction between these acts and other punishments imposed by Ansar Dine/AQIM, and thus erroneously finds that Mr Al Hassan made the requisite contribution.

43. My colleagues find that Mr Al Hassan's contribution allowed not only the Islamic Police to work effectively but also allowed other institutions to perform their duties in an organised way and to maintain the coercive environment imposed on the population.[75]

[73] I note in this regard that the charged forced marriages differ from the Chamber's general description of *jihadi* marriages in many aspects, including in that there were no involvement of intermediaries for the purpose of negotiations but rather direct force was used to place the women in these forced marriages.
[74] *See* section 1.i above.
[75] *See* paragraph 1686 of the Trial Judgment.

Regarding in particular the arrests and detention by the *Hesbah*, my colleagues find that these acts were inherent to the enforcement of the repression system to which Mr Al Hassan, who was 'a key player within a synergistic repression system through which members of the relevant institutions committed the crimes', contributed.[76]

44. In my view, the findings of my colleagues demonstrate nothing more than Mr Al Hassan's contribution to the activities of Ansar Dine/AQIM in a general sense and not that Mr Al Hassan contributed towards the commission of the crimes in particular.[77]

45. My colleagues, first, refer to the fact that the various institutions of Ansar Dine/AQIM, particularly the Islamic Police, the Islamic Court and the *Hesbah*, worked together on a daily basis and shared responsibility for the implementation and enforcement of the rules and prohibitions adopted by Ansar Dine/AQIM.[78] I note that in the underlying factual finding, the Chamber uses the phrase 'shared responsibility' to illustrate the fact that *ta'zir* punishments were imposed by various institutions created by Ansar Dine/AQIM, without making a finding on the extent to which the institutions contributed to each other in terms of imposing punishments.[79] While the Chamber also found that the Islamic Police and *Hesbah* 'could tap into each other's resources', this general finding, based on evidence concerning the organisation of patrols,[80] does not imply that the Islamic Police played any role in the detention of women by the *Hesbah*. Rather, I recall that there was institutional cooperation amongst the Islamic Police and the *Hesbah* before Mohammed Moussa's tenure, as the *Hesbah* handed over arrested persons to the Islamic Police, but this practice ceased after Mohammed Moussa became the emir of the *Hesbah*.[81] Members of the Islamic Police, including those at a higher rank, did not possess the authority to instruct the emir of the *Hesbah* to behave in a certain way. The evidence does not demonstrate that Mr Al Hassan or the Islamic Police had any actual involvement in the detention of women by the Mohammed Moussa. To the contrary, Mr Al Hassan indicated that he was surprised by the detention of women by Mohammed Moussa as this was not part of the *Hesbah*'s functions.[82]

[76] *See* paragraph 1686 of the Trial Judgment.
[77] *See* paragraph 1244 of the Trial Judgment.
[78] *See* paragraph 1670 of the Trial Judgment.
[79] *See* section III-C-4-d-ii-b of the Trial Judgment
[80] *See* paragraph 656 of the Trial Judgment, *referring to* P-0150: T-099, p. 55.
[81] *See* paragraphs 528 and 535 of the Trial Judgment.
[82] *See* paragraph 535 of the Trial Judgment.

46. My colleagues also find that Mr Al Hassan was a 'key player within a synergistic repression system through which members of the relevant institutions committed the crimes'.[83] With respect, I am of the view that the concept of synergistic repression system and its contours are not clearly defined by my colleagues. Whether Mr Al Hassan should be characterised as a 'key player', 'leading contributor' or an 'important […] actor'[84] is not the decisive point of contention, as to debate over terminology is to ignore the fundamental fact that the evidence that has been discussed by the Chamber does not demonstrate Mr Al Hassan's ability to contribute to activities of the *Hesbah* in which the Islamic Police had no involvement.[85]

47. Further, my colleagues fail to explain how the detention of women by Mohammed Moussa would be part of any 'synergistic system of repression'. As noted above in relation to the common purpose, the emirs of Ansar Dine/AQIM advised Mohammed Moussa that the manner in which he detained women at the BMS did not meet the necessary criteria or standards.[86] Ansar Dine/AQIM members filed complaints about Mohammed Moussa with their respective emirs or with Abou Zeid in relation to the imprisonment of women.[87] Mr Al Hassan himself received complaints and spoke to the emir of the Islamic Police, saying that Mohammed Moussa's actions were not recognised in *Sharia*.[88] The detention of women for alleged breaches of the dress code by Mohammed Moussa was clearly at odds with Ansar Dine/AQIM's approach to avoid over-provoking the population of Timbuktu.[89] Mohammed Moussa was eventually removed for his actions, further indicating that his actions were not in line with the objectives of Ansar Dine/AQIM.[90]

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[83] *See* paragraph 1686 of the Trial Judgment.
[84] *See* paragraphs 1674 and 1686 of the Trial Judgment.
[85] As recalled below in relation to Mr Al Hassan's contribution to acts of rape in detention (*see* paragraph 50, I note that in relation to the destruction of mausoleums, in which the Islamic Police was involved, the Chamber unanimously found that it is unnecessary to undertake any legal characterisation for Count 7 as there is insufficient evidence to establish that Mr Al Hassan took any particular action or had a specific role. With respect, I do not understand why Mr Al Hassan had, on one hand, to the detention of women by the *Hesbah* due to his role in the 'repression system', but on the other hand the same role in the 'repression system' would not amount to a contribution under Count 7. Given that Mr Al Hassan did not make the requisite contribution in relation to Count 7, I am of the view that there would *a fortiori* be no contribution with respect to the arrests and detention by the *Hesbah*.
[86] *See* paragraph 541 of the Trial Judgment. *See also* footnote 25 above.
[87] *See* paragraph 539 of the Trial Judgment.
[88] *See* Mr Al Hassan's statement MLI-OTP-0051-1124, at 1150.
[89] *See* paragraph 17 above.
[90] *See* paragraph 543 of the Trial Judgment. Mr Al Hassan explained that Mohammed Moussa was removed due to his actions (Mr Al Hassan's statement MLI-OTP-0051-1124, at 1149).

48. In sum, I am of the view that none of the acts and conduct referred to by my colleagues demonstrate that Mr Al Hassan made any contribution to the crimes, *i.e.* the detention of Fadimata Mint Lilli (P-0547), P-0570, P-0636, Azahara Abdou (P-1134), Salamata Warnamougrez (P-1710), Hady Aguissa (P-1711) and P-1712, under Counts 2 and 4-6.

49. Further, in relation to the *mens rea*, I recall that it is not sufficient to establish that the accused had knowledge of the group's general criminal intention but rather he must be aware of the group's intention to commit the specific crime to which he is contributing.[91] Given the reaction of the members of Ansar Dine/AQIM as recalled above and the fact that Mr Al Hassan himself stated that the relevant acts of detention exceeded the scope of the official duties of the *Hesbah*[92] and was contrary to *Sharia*,[93] I am also of the view that Mr Al Hassan could not have had the requisite *mens rea* in relation to the detention of women by the members of the *Hesbah* under Mohammed Moussa.

ii. Mr Al Hassan's contribution to the crime of rape in detention charged under Counts 11-12

50. For reasons set out above, I consider that the crime of rape committed against detained women falls outside of the common purpose of Ansar Dine/AQIM.[94] In addition, noting that the victims were detained by the *Hesbah* under Mohammed Moussa and raped by its members, I consider, for the reasons already set out above,[95] that Mr Al Hassan made no contribution to the crime of rape perpetrated in the context of such detention. While there must be a contribution towards the commission of the crime and not solely to the activities of the group in a general sense, in my view the evidence demonstrates nothing more than Mr Al Hassan's contribution to the activities of Ansar Dine/AQIM in a general sense and not to *the crime* of rape in detention.

51. Notwithstanding, in any event I join the reasoning and conclusion in the Trial Judgment that there is insufficient evidence proving beyond reasonable doubt Mr Al Hassan's awareness of the intention of members of Ansar Dine/AQIM to engage in acts of rape in detention, let alone that a requisite contribution by Mr Al Hassan would have been

[91] *See* paragraph 1248 of the Trial Judgment.
[92] Mr Al Hassan's statement, MLI-OTP-0051-1124, at 1145.
[93] Mr Al Hassan's statement, MLI-OTP-0051-1155, at 1175; Mr Al Hassan's statement, MLI-OTP-0051-1124, at 1150.
[94] *See* section 1.ii above.
[95] *See* paragraphs 42-49 above.

intentional or made with the aim of furthering the criminal purpose of Ansar Dine/AQIM in relation to the crime of rape, committed against detained women.[96]

iii. Mr Al Hassan's contribution to the crime of forced marriage and associated acts of rape and sexual slavery charged under Counts 8-12

52. As noted above, I consider that the forced marriages, and associated acts of rape and sexual slavery, are outside of the common purpose of Ansar Dine/AQIM.[97] Further, for reasons developed below, I am unable to join the findings made by my colleagues on Mr Al Hassan's contribution to these crimes including on the requisite mental element.

53. In this regard, I recall that a contribution must be towards the commission of the crime and as such one must carry out a case-by-case analysis in light of the specific context of the case as to the links between the contribution and the commission of the crime.[98] With respect, I am of the view that the findings of my colleagues are based on general facts concerning: (i) Mr Al Hassan's role in *jihadi* marriages, which do not prove his contribution to the charged forced marriages; and (ii) Mr Al Hassan's role within the Islamic Police, which has no bearing on Mr Al Hassan's contribution specifically towards the crime of forced marriages.

54. My colleagues note that Mr Al Hassan (i) wrote to his superiors requesting support payments for Islamic Police officers who wished to marry; and (ii) participated in mediations in the context of '*jihadi* marriages', including as an intermediary in the arrangement of Abou Zhar's marriage.[99] In my view, none of these facts, taken individually or cumulatively, amount to contribution to the crime of forced marriage and associated rape and sexual slavery. As noted above in relation to the common purpose, my colleagues impermissibly conflate *jihadi* marriages, which were not necessarily criminal in nature, and the charged crimes of forced marriages.[100] No evidence has been laid before the Chamber indicating that the aforementioned acts of Mr Al Hassan concerned forced marriages, as opposed to *jihadi* marriages in general. Rather, what the evidence demonstrates is that the position adopted by Abou Zeid was not to condone the

[96] *See* paragraph 1725 of Trial Judgment and *generally* paragraphs 1721-1726 of Trial Judgment.
[97] *See* section 1.iii above.
[98] *See* paragraph 1244 of the Trial Judgment.
[99] *See* paragraphs 1711-1713 of the Trial Judgment.
[100] *See* paragraph 36 above.

use of force or threats to enter into a marriage,[101] thus making it unlikely, in my view, that the acts performed by Mr Al Hassan in his official capacity were done to contribute to forced marriages carried out by the use of threats and force. In particular, while it has indeed been established that Mr Al Hassan acted as an intermediary in marriages, at least in the case of Abou Zhar, there is no evidence that these concerned forced marriages similar to the charged incidents. Mr Al Hassan's participation in Abou Zhar's marriage comprised visiting the woman's family to negotiate dowries.[102] D-0605 testified that the marriage of Abou Zhar was conducted with the agreement of the woman's family.[103] In another instance where Mr Al Hassan accompanied a prospective 'husband', the marriage proposal was refused and the marriage did not happen at all.[104] Given the nature of these two instances in which Mr Al Hassan was involved in *jihadi* marriages, I do not consider that the role he played constitutes a contribution to 'the pressure brought to bear on women and their families which facilitated forced marriages'.[105] There is no concrete evidence proving that Mr Al Hassan participated in forcing or threatening women to enter into marriages with members of Ansar Dine/AQIM as an intermediary.

55. My colleagues also note general circumstances concerning the control of Timbuktu, and conclude that 'Mr Al Hassan's important role in the Islamic Police, particularly his contribution to the Islamic Police's enforcement of Ansar Dine/AQIM's rules and prohibitions, as well as to the Islamic Police's control of Timbuktu through armed patrols' constitutes a contribution to the crime of forced marriage.[106] I respectfully disagree with this assessment. As recalled above, the requisite assessment under the provision is whether a contribution has been made towards the commission of *the crime* and not solely to the activities of the group in a general sense.[107] The findings of my colleagues demonstrate nothing more than that Mr Al Hassan made a contribution to the activities of Ansar Dine/AQIM in a general sense. Such a generic contribution is, in my view, too distant to constitute a contribution to the commission of the crime of forced marriage, considering that there is a wide gap between Mr Al Hassan's work in the Islamic Police and the crime of forced marriage. Absent a showing of Mr Al Hassan's involvement in

[101] *See* paragraph 503 of the Trial Judgment, *referring to* P-0150: T-113, pp. 29-30.
[102] *See* footnote 1364 of the Trial Judgment.
[103] *See* footnote 1364 of the Trial Judgment, *referring to* D-0605: T-194, pp. 31-32.
[104] *See* Mr Al Hassan's statement MLI-OTP-0051-0891, at 0898-0899.
[105] *Contra* paragraph 1713 of the Trial Judgment.
[106] *See* paragraph 1712 of the Trial Judgment.
[107] *See* paragraph 1244 of the Trial Judgment.

coercing women into the marriages, I do not consider that there is any contribution to the crime of forced marriage and associated acts of rape and sexual slavery.

56. In relation to the *mens rea*, as noted by the Chamber, it is not sufficient to establish that the accused had knowledge of the group's general criminal intention but rather he must be aware of the group's intention to commit the specific crime or crimes to which he is contributing.[108] In this regard, I consider that there is insufficient evidence to determine that Mr Al Hassan was aware of any intention by members of Ansar Dine/AQIM to commit the crimes of rape and sexual slavery in the context of the forced marriages of local women. None of the facts cited by my colleagues demonstrate that 'the only possible conclusion' is that Mr Al Hassan had this specific knowledge. The reasons set out above in relation to the common purpose[109] applies *mutatis mutandis*: in circumstances where even senior members of Ansar Dine/AQIM, such as P-0150, were of the view that there were no marriages involving 'direct compulsion' it is implausible that Mr Al Hassan had any awareness that the charged forced marriages, and associated acts of rape and/or sexual slavery, would occur in the ordinary course of events. Accordingly, I am also of the view that Mr Al Hassan lacked the requisite *mens rea*.

iv. Mr Al Hassan's contribution to other incidents under Counts 1-6 and 14

57. It follows from the aforementioned analysis that I respectfully disagree with my colleagues' reasoning underpinning their assessment on Mr Al Hassan's contribution to other incidents charged under Counts 1-6 and 14, apart from those discussed in section II-A-2-i of the present opinion. In particular, I am unable to join my colleagues as, in my respectful opinion, the reasoning adopted implies that Mr Al Hassan is responsible for all acts committed by Ansar Dine/AQIM in Timbuktu. However, while I depart from my colleagues' reasoning, for reasons mentioned below, I agree with their conclusion that Mr Al Hassan made a contribution, within the meaning of Article 25(3)(d), with respect to these other incidents for which he is charged under Counts 1-6 and 14.

58. In relation to these other incidents, I notably recall that Mr Al Hassan played a key role *within* the Islamic Police until the end of Ansar Dine/AQIM's control of Timbuktu and he maintained his presence in the Police force even through changes in the person

[108] *See* paragraph 1248 of the Trial Judgment.
[109] *See* paragraph 39 above.

officially designated as the emir of the Police.[110] While Khaled was head of the Police, Mr Al Hassan translated the instructions Khaled gave to the Islamic Police members.[111] While Mr Al Hassan served as an interpreter for the Islamic Police[112] he also had many other functions and responsibilities.[113] In his time in the Police, Mr Al Hassan shared an office with other senior members of the Police, including the Police commissioner/emir.[114] Witnesses also described Mr Al Hassan's role, demonstrating that that he was a high-ranking Police officer.[115] By the end of Ansar Dine/AQIM's control of Timbuktu, and for a short period in January 2013, Mr Al Hassan replaced Khaled as commissioner of the Police.[116] In his position within the Islamic Police, he also organised Police work, including organising and participating in patrols and registering new members.[117] Mr Al Hassan was in a position to give orders to Police members and where he did so, they followed his instructions,[118] evidence of his authority within the Police force.

59. For these reasons, I agree with my colleagues that the Defence's argument that Mr Al Hassan exercised no real power within the Islamic Police and played a limited, clerical and subordinate role[119] must be dismissed.

60. Further, Mr Al Hassan issued summons for locals to appear in front of the Police and participated in arrests of people accused of crimes by Ansar Dine/AQIM.[120] Mr Al Hassan at times visited the Central Prison to check on the prisoners' conditions.[121] He received complaints from locals, heard and settled disputes between them.[122] Mr Al Hassan approved media activity on behalf of the Police and issued permits to residents and journalists.[123] He also worked to disperse crowd and demonstrations in the streets of Timbuktu.[124] Mr Al Hassan wrote and signed numerous Police reports, including for

[110] *See* paragraph 1063 of the Trial Judgment.
[111] *See* paragraph 565 of the Trial Judgment.
[112] *See* paragraphs 565 and 1068 of the Trial Judgment.
[113] *See* section III.F.3 of the Trial Judgment.
[114] *See* paragraphs 560 and 562 of the Trial Judgment.
[115] *See* paragraph 1065 of the Trial Judgment.
[116] *See* paragraph 1064 of the Trial Judgment.
[117] *See* paragraph 1069 of the Trial Judgment.
[118] *See* paragraph 1069 of the Trial Judgment.
[119] *See* Defence Final Brief, paras 8-9, 69-92.
[120] *See* paragraph 1073 of the Trial Judgment.
[121] *See* paragraph 1077 of the Trial Judgment.
[122] *See* paragraphs 569, 1071, 1073 of the Trial Judgment.
[123] *See* paragraph 1072 the Trial Judgment.
[124] *See* paragraph 1071 of the Trial Judgment.

cases of individuals found in breach of the rules and prohibitions, and brought accused persons to and from the Islamic Court,[125] and was, along with other members of the Police, often seen at the Islamic Court.[126] Mr Al Hassan was present during several public punishments, execution of sentences pronounced by the Islamic Court, and also brought sentenced persons to the punishment sites.[127]

61. The Islamic Police managed all tasks related to the enforcement of penalties and implemented the decisions of the Islamic Court, assisted by other organs of Ansar Dine/AQIM as needed.[128] Where persons were sentenced to public punishment by the Islamic Court, the Police notably took the accused to the public site where the punishment was meted out.[129] Further, the Chamber found that the Police was also charged with the security of the Islamic Court and its judges; members of the Police would always guard the Court, being stationed in front of the entrance of the building and of the courtroom during its hearings.[130]

62. Based on the above analysis denoting Mr Al Hassan's role *within* the Islamic Police and the role of the Islamic Police in the charged incidents as well as its functions vis-à-vis the Islamic Court, I am satisfied that Mr Al Hassan's contribution to the activities of the Islamic Police constitutes a contribution, with the requisite *mens rea*, within the meaning of Article 25(3)(d) with respect to the remaining incidents under Counts 1-6 and 14.

B. Contextual elements of the crimes against humanity under Article 7(1) of the Statute

63. I have joined my colleagues in their conclusion that there was an attack directed against the civilian population of Timbuktu from April 2012 to January 2013. However, I am unable to join some of my colleagues' reasoning in this regard.

64. The *chapeau* of Article 7(1) of the Statute requires that the individual acts underlying crimes against humanity must be committed as part of a widespread or systematic attack directed against a civilian population. This entails a two-step process: *first* it must be

[125] *See* paragraphs 1074-1077 of the Trial Judgment.
[126] *See* paragraph 583 of the Trial Judgment.
[127] *See* paragraphs 585, 684 and 1078 of the Trial Judgment.
[128] *See* paragraph 586 of the Trial Judgment.
[129] *See* paragraph 586 of the Trial Judgment.
[130] *See* paragraph 583 of the Trial Judgment.

established that there was an attack directed against a civilian population, *i.e.* (i) a course of conduct (ii) directed against the civilian population (iii) pursuant to or in furtherance of a policy, that was widespread or systematic; and *second* there must be a determination as to whether each of the acts charged as crimes against humanity had a nexus with the attack. In other words, not all charged acts need to constitute the course of conduct directed against the civilian population. This distinction is important as it need not be shown that each charged act was committed pursuant to or in furtherance of the policy as long as a nexus between the act and the attack can be established.[131]

65. The 'attack' in the present case is defined by the underlying policy of Ansar/AQIM to control the city of Timbuktu in order to impose and enforce new rules and prohibitions on the population as part of its ultimate goal to establish an Islamic State governed by their own interpretation of *Sharia* on the entire territory of Mali. While I am in full agreement with much of the reasoning adopted by my colleagues, I am unable to join my colleagues to the extent that they considers that the 'course of conduct' in the present case included acts of sexual slavery and rape[132] and makes reference to the practice of *jihadi* marriages in assessing the systematic nature of the attack.[133]

66. With respect, I am of the view that my colleagues fail to provide sufficient explanation as to why the acts of forced marriage, rape and sexual slavery can be construed as being part of the 'course of conduct' or why the practice of *jihadi* marriage can be considered in assessing the systematic nature of attack. Particularly with respect to *jihadi* marriages, I recall that this refers to marriages between members of Ansar Dine/AQIM and women from the local population, irrespective of the individual circumstances concerning each marriage.[134] As such, *jihadi* marriages are not in and of themselves crimes under the Statute or acts under Article 7(1). By spontaneously referring to *jihadi* marriages in assessing the systematic nature of the attack, my colleagues, in my view, conflate and equates *jihadi* marriages with forced marriages, notwithstanding that factual findings concerning *jihadi* marriages were made on the basis of evidence pertaining to marriages that were not necessarily forced in nature. Respectfully, I consider this fundamentally

[131] *See* *Katanga* Trial Judgment, paras 1115, 1165.
[132] *See* paragraph 1282 of the Trial Judgment. It is unclear as to whether reference to 'other inhumane acts' at paragraph 1282 of the Trial Judgment includes acts of forced marriages.
[133] *See* paragraph 1295 of the Trial Judgment.
[134] *See* footnotes 1308 and 1323of the Trial Judgment.

erroneous, as developed above in relation to the common purpose requirement under Article 25(3)(d).[135]

67. Turning to the nexus requirement, I am, with regret, unable to join my colleagues' determination that the crimes of rape, forced marriage and sexual slavery have the requisite nexus with the attack. In my view, the acts of forced marriage, rape and sexual slavery were not an integral part of the course of conduct. My colleagues notes that the direct perpetrators of these crimes were in a position of power that enabled them to perpetrate the crimes and that these acts also served the ultimate goal of Ansar Dine/AQIM.[136] Given the Chamber's finding that the multiple acts comprising the 'attack' were committed by Ansar Dine/AQIM against the civilian population of Timbuktu in order to enforce new rules and prohibitions, I consider that there must be due consideration as to whether each crimes have a sufficient linkage with this objective. I am of the opinion that, with respect to the crimes of rape, sexual slavery and forced marriage, there is no evidence indicating that they were part of the 'attack', in view of the nature of the acts and the aims they pursue, for reasons set out above in detail in relation to the common purpose requirement under Article 25(3)(d) of the Statute,[137] and as evidenced by the lack of reference to these acts in relation to the policy requirement. In this regard, it is unclear how the acts of rape, sexual slavery and forced marriage served the ultimate goal of Ansar Dine/AQIM. As noted above, the acts of rape were not condoned by Ansar Dine/AQIM as a matter of policy. While marriages *in general* with the local population were seen as a means to gain influence amongst the locals, I am not convinced that the charged *forced* marriages, which entailed the forcible taking of women and placing them in marriages with components of rape and/or sexual slavery, served the same goal.

68. For these reasons, I am of the view that the nexus requirement is not satisfied with respect to the crimes of rape, sexual slavery and forced marriage.

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[135] *See* section A.1.iii above.
[136] *See* paragraph 1298 of the Trial Judgment.
[137] *See* sections A.1.ii and A.1.iii above. This is not to say however that the nexus requirement and the common purpose requirement entails the same standard. To the contrary, it is my view that while the arrests and detention of women by the *Hesbah* did not form part of the common purpose (*see* section A.1.i above), the same acts do have a nexus with the attack, given that they were perpetrated by members of Ansar Dine/AQIM as punishments for breaches of the groups' rules during the control of Timbuktu by Ansar Dine/AQIM.

III. INTERPRETATION OF 'LAWFUL SANCTIONS' UNDER ARTICLE 7(2)(E) OF THE STATUTE

69. The term 'lawful sanctions' is referenced in Article 7(2)(e) of the Statute, noting that for the purpose of Article 7(1), the 'pain or suffering arising only from, inherent in or incidental to, lawful sanctions' would not constitute torture as a crime against humanity. My colleagues conclude that corporal punishments that satisfy all the elements of the crime of torture under Article 7 of the Statute, particularly the severe pain or suffering element, cannot constitute lawful sanctions.[138]

70. To be clear at the outset, it is not my intention to condone corporal punishments nor to argue in this opinion that such punishments are generally permitted under international human rights law. However, I do not share my colleagues' conclusion that such punishments constitute, as a rule, torture within the meaning of the Statute, and amount to a crime against humanity.

71. This is particularly so because all violations of international human rights law do not *ipso facto* also amount to international criminal acts. I acknowledge that my colleagues do not expressly say so, nor does it purport to apply directly the human rights bodies' decisions to the Statute – rather it uses decisions of the human rights bodies to interpret the term 'lawful sanctions' in the Statute, which it may legitimately do, under Article 21(3) of the Statute.[139] However, it may not always be appropriate to use decisions of human rights bodies as an interpretative tool for international criminal law and some caution may be warranted on certain occasions in using such decisions. Notably, human rights bodies' decisions are directed primarily at States, whereas international criminal law under the Statute is concerned with the punishment of individuals because of the commission of international crimes – two ideals that need not necessarily and always be in consonance.[140]

72. My colleagues cite a number of decisions from international and regional human rights bodies which find that corporal punishments are inconsistent with the applicable human

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[138] *See* paragraph 1144 of the Trial Judgment.
[139] *See* paragraph 1142 of the Trial Judgment.
[140] *See similarly* *Gaddafi* OA6 Judgment, paras 169, 219. The Appeals Chamber noted, in relevant part, that '[i]ndeed, the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights. However, if the interpretation proposed by the Defence were adopted, the Court would come close to becoming an international court of human rights'.

rights instruments.[141] However, none of these instruments contains the 'lawful sanctions' exemption. In contrast, the Statute, borrowing from the Convention against Torture, does contain the 'lawful sanctions' exception.

73. The cardinal principle of *effet utile* dictates that treaties, such as the Statute, must be interpreted in a manner that attributes meaning to every word of its provision.[142] The existence of the 'lawful sanctions' clause in Article 7(2)(e) of the Statute implies that there exists a set of punishments that would otherwise constitute torture, but due to this exception, do not. To suggest that *any* punishment which meets the severity of the degree of pain or suffering threshold cannot ever constitute a 'lawful sanction' would essentially render the expression 'lawful sanctions' meaningless and devoid of effect.

74. Further, to suggest that corporal punishments can *never* benefit from the exception of 'lawful sanctions' would be to create a hierarchy of sorts among punishments, and imply that one category of punishments (*i.e.* corporal punishments) cannot fall under this exemption. It is, at the least, unclear whether such a conclusion is supported by the plain meaning of the term 'lawful sanctions' – which, I acknowledge, as my colleagues note, is left undefined in the Statute or the Elements of Crimes.[143]

75. Having recourse to the drafting history of the Statute, it is clear that some delegations attached significant importance to the 'lawful sanctions' exception under the definition of torture.[144] During the drafting of the Convention against Torture, the lawful sanctions exemption was included at the insistence of a number of States, owing to the issue of corporal punishments constituting a valid form of punishment in those States.[145] The insertion of this exception was done precisely in order to open the Convention against Torture to certain Islamic States which 'did not want to be party to an instrument which

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[141] *See* paragraph 1142 of the Trial Judgment.
[142] *See* *Canada – Renewable Energy and Feed-in Tariff Program* AB Report, para. 5.57; *Korea – Dairy Products* AB Report, paras 80-81. *See also* *Palestine* Jurisdiction Decision, para. 81; *Application of the ICERD* Judgment, paras 133-134. *Anglo-Iranian Oil Co.* Judgment, p. 16; *Fisheries Jurisdiction* Judgment, para. 52; *Free Zones* Order of 1929, p. 13.
[143] *See* paragraph 1141 of the Trial Judgment.
[144] *See* D. Robinson, 'Article 7(1)(f)' in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 92 ('[t]here was some discussion as to whether the "lawful sanctions" exception should be addressed in an element or as a footnote. Since the Elements were to provide a list of items to be proven, exceptions and defences were often not included in the Elements. However, because of the importance attached to this exception by some delegations, it was included as an element.').
[145] *See* H. Danelius and H. Burgers, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), p. 103; G. Zach, 'Article 1: Definition of Torture' in M. Nowak (ed.) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2019), pp. 37-39.

deemed the imposition of certain corporal punishments under *Sharia* to be a breach of the Convention'.[146]

76. While it may be the case that the development of international human rights law has increasingly cast an aspersion on the legality of such punishments, this does not automatically imply that such developments can serve to make such punishments a crime under international criminal law, particularly when the Statute, on its text, retains this exemption. Since not *all* violations of international human rights law give rise to individual criminal responsibility under international law, the Chamber must, at the least, entertain the possibility that corporal punishments could well be a violation of international human rights law, but at the same time, *not* amount to the crime against humanity of torture under the Statute. Such ambiguity is best left to be resolved by the States Parties by way of an amendment to the Statute if necessary, but not by the judicial interpretation of this Chamber, given that some States continue to retain some forms of corporal punishment in their penal laws including flogging and amputation.

77. The Defence also raises, in this context, an argument based on the need to afford a 'margin of appreciation to the cultural contexts and capacities of different communities' as well as the need to ensure 'legal pluralism'.[147] In response, the Chamber notes that proposals to include language on cultural relativism were rejected during the drafting of the Statute.[148] While this is undoubtedly true – and cultural relativism must not be used as an excuse for committing international crimes or perpetuating impunity – with respect to the specific issue at hand, the Chamber must be mindful of the diversity of the forms of criminal punishment worldwide. In particular, to suggest that certain forms of punishment that are allowed/used in some non-western parts of the world, can never constitute 'lawful sanctions', in my opinion, may detract from the 'international' nature of the Court.

78. At the very least, the preceding discussion illustrates that there exists *some* semblance of doubt on this issue, and in such cases of doubt, the Chamber should adopt reticence and avoid making a conclusive finding, particularly when, as I will demonstrate below, it does not need to make a broad finding on this issue in this case.

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[146] *See* G. Zach, 'Article 1: Definition of Torture' in M. Nowak (ed.) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2019), pp. 37-39.
[147] *See* Defence Final Brief, para. 504.
[148] *See* paragraph 1137 of the Trial Judgment.

79. For the exception under Article 7(2)(e) to be applicable, the pain or suffering must arise only from or be inherent in or incidental to 'lawful sanctions'. Thus, such sanctions must necessarily be 'lawful'. The Defence concedes as much when it states that 'lawfulness is satisfied by sanctions deriving from laws that are (i) accessible, (ii) "possess a degree of precision that allows for sufficient predictability and foreseeability of a potential restriction of a right' and (iii) provide a general 'adequate and effective protection against arbitrariness".'[149]

80. In this case, however, as the facts narrated in the Trial Judgment demonstrate, these 'sanctions' in the form of corporal punishment were far from lawful. In the case of corporal punishments carried out by members of the *Hesbah* or the Islamic Police without a judgment, it is clear that these were entirely without due process.[150] Further, for corporal punishments that were handed out by the Islamic Court, it is clear that these were also entirely unlawful, since the Islamic Court was not a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable, and as such, lacked the essential judicial guarantee of independence and impartiality.[151]

81. Accordingly, I am of the view that the Chamber did not need to find that corporal punishments can never benefit from the lawful sanctions exemption under the Statute for torture as a crime against humanity, and should have restricted itself to finding that in the circumstance of the facts *in this case*, the lawful sanctions exemption was clearly inapplicable.

IV. FINDINGS ON ALTERNATIVE MODES OF LIABILITY

82. Where Mr Al Hassan is charged with more than one mode of liability in relation to a particular incident, my colleagues enter findings on all modes of liability and conclude that they would have found Mr Al Hassan criminally responsible under the alternative mode of liability as well.[152] I respectfully disagree with this approach.

83. In my view, it is the responsibility of trial chambers to choose the mode of liability that best reflects an accused's culpability, if a conviction is entered.[153] This is in contrast with

[149] *See* Defence Final Brief, para. 496.
[150] *See* paragraphs 1480-1493 of the Trial Judgment.
[151] *See* paragraphs 1499-1515 of the Trial Judgment.
[152] *See* paragraph 1582 of the Trial Judgment.
[153] *See* *Mustafa* Trial Judgment, para. 725.

the role of pre-trial chambers, which have on occasion, including in the present case, confirmed charges on the basis of alternative modes of liability. Conversely, if an accused is found criminally responsible under one mode of liability which fully reflects his or her culpability, a trial chamber may not proceed with analysing other modes of liability for the same conduct under the same count.[154]

84. This has also been the consistent position adopted in recent trial proceedings before the Court. Trial Chamber VI, having established Mr Bosco Ntaganda's principal liability under Article 25(3)(a) of the Statute, stated that '[w]hile […] a person's conduct may be capable of satisfying elements of one or more modes of liability [the Chamber] does not find it appropriate or necessary […] to reach any further finding on the remaining liability alternatives'.[155] The *Ongwen* and *Al Mahdi* Trial Chambers similarly considered it unnecessary to even set out the requirements for the alternative modes of liability.[156] In *Al Mahdi*, Trial Chamber VIII further found that 'when all the elements of different variations under Article 25(3)(a) of the Statute are proven, the Chamber must elect which mode of responsibility best reflects the full scope of the Accused's individual criminal responsibility' in order to avoid punishing the accused twice.[157]

85. In my respectful opinion, there is no cogent reason to deviate from these consistent precedents in the case at hand and my colleagues' position is inconsistent with the duties and functions of the Chamber. Indeed, the facts of the present case are not such that they require findings at trial on the alternative modes of liability.

86. My colleagues clarify that 'any conviction is entered only for the mode of liability best suited to denote the accused's responsibility'. However, with respect, I do not see any meaningful distinction between entering a conviction and entering a finding that all of the elements of the alternative mode of liability are fulfilled and Mr Al Hassan would be responsible under the same. If the intention is not to punish Mr Al Hassan twice, and there is no link to the conviction, I fail to see any reason to make an analysis as to whether the elements of the alternative mode of liability are fulfilled. In my view, there is no need to carry out such an analysis for the purpose of 'completeness', for the same reason that the Chamber did not find it necessary to analyse the legal characterisation of facts in relation

[154] *See* *Mustafa* Trial Judgment, para. 725. *See also* *Krajišnik* Trial Judgment, para. 877.
[155] *See* *Ntaganda* Trial Judgment, para. 1200.
[156] *See* *Ongwen* Trial Judgment, para. 2780; *Al Mahdi* Trial Judgment, para. 20.
[157] *See* *Al Mahdi* Trial Judgment, para. 80.

to crimes for which Mr Al Hassan would not have been convicted due to impermissible concurrence.[158]

87. For these reasons, and following the Court's practice, after having found Mr Al Hassan criminally responsible under one mode of liability, I would have refrained from making any analysis under the alternative modes of liability.

V. MR AL HASSAN'S INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER ARTICLE 25(3)(C) OF THE STATUTE

88. Although I form a Majority with Judge Mindua in declaring Mr Al Hassan not criminally responsible in relation to Count 6 under Article 25(3)(c) of the Statute, I do so for different reasons.

89. My colleagues consider that Mr Al Hassan's writing and signing of Islamic Police reports constituted assistance, within the meaning of Article 25(3)(c) of the Statute, to the commission of the war crime of sentencing without due process (Count 6) by members of the Islamic Court against the following nine individuals: (i) Ibrahim bin Al-Husayn; (ii) Al-Husayn Bin 'Umar and Halimah Bint Muhammad; (iii) Al-Khayr Bin-Sidi; (iv) Moussa Ben Mohamed el-Joumaa or Muhammad Musa Muhammad al-Jam'at, 'Abdu, 'Ali al-Jaw and Adulahi; (v) Abdelkarim Ascofare or 'Abd-al-Karim Iskufari; (vi) Muhammad Bin Musa; (vii) Muhammad Walad, Aghli Asudh and Arjili Bin Aman; (viii) Yahya Bin-Muhammad or his companion; and (ix) El-Khamis Bin-el-Sabt.[159]

90. Article 25(3)(c) expressly sets forth a purpose requirement according to which the accessory must act 'for the purpose of facilitating the commission of such crime'. This wording introduces a 'higher subjective mental element' and means that the accessory must have lent his or her assistance with the aim of facilitating the crime; it is not sufficient that the accessory merely knows that his or her conduct will assist the principal in the commission of the crime,[160] contrary to the jurisprudence of the *ad hoc* tribunals which does not require the aider and abettor to share the intent of the perpetrator to

[158] *See* paragraphs 1341 and 1364 of the Trial Judgment.
[159] *See* paragraphs 1606-1615 of the Trial Judgment.
[160] *See* paragraph 1227 of the Trial Judgment, *referring to* *Bemba et al*. Trial Judgment, para. 97. *See also* A. Eser, 'Individual Criminal Responsibility' in A. Cassese *et. al*. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 801.

commit the crime.[161] I am of the view that this mental element has not been established with respect to Mr Al Hassan in relation to the crime of sentencing without due process.

91. My colleague find that, in light of the relationship between the work of the Islamic Police and the work of the Islamic Court, and notably the important function of the Islamic Police reports in the Islamic Court's judicial process coupled with Mr Al Hassan's knowledge of the lack of independence and impartiality of the Court, Mr Al Hassan's assistance was provided for the purposes of facilitating the sentencing of the individuals pursuant to judgments pronounced by a court which was not independent nor impartial.[162]

92. I am unable to join this assessment. While the aforementioned facts may demonstrate that Mr Al Hassan had knowledge of the intention of the perpetrators to commit the crime of sentencing without due process, they do not demonstrate that Mr Al Hassan committed acts *for the purpose of* facilitating this crime.

93. In this regard, I note first that while reports from the Islamic Police were transmitted to the Islamic Court, Islamic Court judges were not bound, as a rule, by the police reports.[163] Indeed, as described above Islamic Court judges had their own powers and could, if they so wished, independently investigate cases including by calling witnesses.[164] Further, the Police reports were not a *sine qua non* for proceedings to be instituted before the Islamic Court. In addition, the Islamic Police had no power to recommend any specific sentences or category of punishments, which was the sole competence and discretion of the Islamic Court judges (subject to the influence from the leadership of Ansar Dine/AQIM, as noted in the Trial Judgement).[165] Based on the evidence before the Chamber, I consider that the concrete impact of the Police reports on the core of the Islamic Court proceedings was somewhat limited, remote or unknown in the specific cases at hand. I also recall that Police reports were drafted concerning various issues encountered by the Islamic Police, and were not limited to criminal cases that were brought before the Islamic Court.[166] Mr Al Hassan's conduct in question was done within this context of the policing system set

[161] *See* *Mbarushimana* Confirmation Decision, paras 274, 281.
[162] *See* paragraph 1614 of the Trial Judgment.
[163] *See* paragraphs 620, 625, 627-631 of the Trial Judgment.
[164] *See* paragraphs 627-629, and 630 of the Trial Judgment.
[165] *See* paragraphs 639-646 of the Trial Judgment.
[166] *See* paragraph 1075 of the Trial Judgment. *See also* Annex 2 to the Prosecution Final Brief.

up by Ansar Dine/AQIM, but not with the specific purpose of facilitating the commission of this specific crime by members of the Islamic Court.[167]

94. Accordingly, I am unable to find Mr Al Hassan guilty under Article 25(3)(c) with respect to the aforementioned nine incidents, as Mr Al Hassan's contribution was not done *with the purpose of facilitating the crime*. Thus, I would have considered the contribution of Mr Al Hassan, comprising the drafting and signing of the Police reports and other activities such as bringing and taking defendants to and from the Court, under Article 25(3)(d) of the Statute and, for the reasons stated above[168] and in the Trial Judgment,[169] join in ultimately finding Mr Al Hassan liable under Article 25(3)(d) of the Statute with respect to these nine incidents.

VI. THE CRIME OF PERSECUTION UNDER ARTICLE 7(1)(H) OF THE STATUTE

95. I form a Majority with Judge Prost in declaring Mr Al Hassan guilty in relation to the crime against humanity of persecution. However, with respect, I disagree with the reasoning in the Trial Judgment on the scope of acts constituting the crime of persecution and the interpretation of the fourth element of this crime, namely that the conduct must have been committed 'in connection with' any act under Article 7(1) of the Statute or any crime within the Court's jurisdiction. For reasons set out below, I am also of the view that the crime of persecution was based on religious grounds but that the evidence does not demonstrate that Mr Al Hassan can be convicted for persecution on gender grounds.

96. My colleagues, in essence, take the position that the connection requirement need not be assessed with respect to each of the underlying acts of persecution, but rather requires that 'the persecution […] must be connected with a crime'.[170]

97. I acknowledge that the definition of the crime against humanity under the Statute may differ from that under customary international law or at the *ad hoc* tribunals, to the extent

[167] In this regard, I note that the incidents of Dédéou Maiga, with respect to whom my colleagues find that Mr Al Hassan drafted a police report, and Nuh bin Muhammad, 'Isa Bin Jadu, Muhammad Shaka, Ali Bin Barakah and Abdallah Bin Muhammad al-Jum'at (case 04/1433-2012), with respect to whom Mr Al Hassan wrote a report, are charged under Article 25(3)(d) only and no Regulation 55 notice was provided. Indeed, I am of the view that the mere act of signing a report does not, in and of itself, incur liability under Article 25(3)(c) and it would be consistent with the Chamber's own position to consider Mr Al Hassan's responsibility under Article 25(3)(d) for the nine cases.
[168] *See* section V.C.2.b).ii of the Trial Judgment.
[169] *See* section II.A.2.iv above.
[170] *See* paragraphs 1210, 1575-1579 of the Trial Judgment.

that Article 7(1)(h) of the Statute includes the 'connection' requirement.[171] Thus, I believe that this difference in the requirements must properly be taken into account when interpreting the Statute in line with the ordinary meaning of the text.

98. In this regard, I note that the draft articles adopted by the ILC on crimes against humanity retain a similar requirement, that the persecutory acts be committed 'in connection with any act referred to in this paragraph',[172] notwithstanding suggestions by some States to remove this requirement.[173] The ILC explained that the purpose of the inclusion of this requirement was due to 'a concern that otherwise the text would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity'.[174] In my view, the connection requirement under Article 7(1)(h) of the Statute serves exactly this purpose: to filter out discriminatory practices that do not amount to crimes against humanity or other crimes under the Statute. Contrary to the concerns expressed by my colleagues,[175] interpreting the connection requirement in this manner would not reduce the crime of persecution to an auxiliary offence or aggravating factor, since the underlying act of persecution need not be a crime in and of itself; it need only maintain a 'connection' with a crime. On the other hand, my colleagues' interpretation is untenable as it renders the 'connection' requirement meaningless, contrary to the intended purpose. Further, it appears rather circular to say, in relation to the fourth element of the crime of persecution, that 'it is the persecution which must be connected with a crime [or an Article 7(1) act]', as there is no 'persecution' as such unless it has been established that this particular element is satisfied.

99. It follows that I would have assessed *in concreto* whether each of the underlying acts of persecution were committed 'in connection with' any act under Article 7(1) of the Statute or any crime within the Court's jurisdiction. Such an assessment is necessary as the crime of persecution, notwithstanding its nebulous character, cannot be used as a catch-all charge.[176] As part of this assessment, and in view of the accused's rights under Article 67

[171] *See* Observations of the United Nations Office of the High Commissioner for Human Rights, A/CN.4/726, pp. 137-138; G. Werle & F Jeßberger, *Principles of International Criminal Law* (2020), p. 262.
[172] *See* Report of the International Law Commission on its 71st session, A/74/10, p. 12.
[173] On discussions by States on this issue, *see* A/CN.4/726.
[174] *See* Report of the International Law Commission on its 71st session, A/74/10, p. 44.
[175] *See* paragraph 1209 of the Trial Judgment.
[176] *See* *Kupreškić et al.* Appeal Judgment, para. 98.

of the Statute, only those acts that are set out in the charges with sufficient clarity may be taken into account as underlying acts of persecution.[177]

100. However, I agree with my colleagues in their findings at paragraphs 1530-1532, 1562-1565 and 1567-1570 of the Trial Judgment. Notably, I concur that the acts charged under Counts 1-5 and 14, apart from those falling outside the common purpose,[178] constitute severe deprivation of fundamental rights targeting the civilian population of Timbuktu on religious grounds. These crimes were perpetrated as part of the rules imposed by Ansar Dine/AQIM, which prohibited the local population from practising or taking part in certain religious and traditional customs.[179] For example, rules were put in place prohibiting extra-marital sexual relationships and the consumption and sale of tobacco and alcohol.[180] These rules and prohibitions were imposed on the local population through the implementation of a system of surveillance and punishment,[181] comprising crimes charged under Counts 1-5 and 14. I am also satisfied that each of the aforementioned rules and prohibitions involving the charged crimes were committed 'in connection with' a crime under the Statute on religious grounds.

101. For reasons set out above, where I set out my position that forced marriages and associated conduct as well as the rape in detention were not part of the common purpose of Ansar Dine/AQIM,[182] I would also not have considered these acts as underlying acts of persecution. In particular, I consider that there is no evidence to support a finding that the victims of forced marriages and rapes in detention by Ansar Dine/AQIM were, once

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[177] *See* *Kupreškić et al*. Appeal Judgment, para. 98.
[178] *See* section II.A.1.i above. In relation to the destruction of mausoleums charged under Count 7, I recall that the Chamber has unanimously determined that there is insufficient evidence to establish that Mr Al Hassan took any particular action or had a specific role in relation to the demolition of the mausoleums (*see* paragraph 1530 of the Trial Judgment). Accordingly, I have not taken into account these facts in my assessment of the underlying acts of the crime of persecution. In any event, I recall that Article 8(2)(e)(iv) of the Statute requires that there be an the 'attack' which is, in the context of Article 8, defined as 'acts of violence against the adversary, whether in offence or defence' (*see* *Katanga* Trial Judgment, para. 798). As noted elsewhere by Judge Morrison and Judge Hofmański, I consider that such an interpretation is in line with both the established framework of international law and the *travaux préparatoires* (*See* Judge Morrison and Judge Hofmański Opinion in *Ntaganda* Appeal Judgment). The destruction of the mausoleums in the present case was not carried out during the conduct of hostilities. Accordingly, even if the facts had portrayed a different picture with respect to Mr Al Hassan's criminal responsibility under Count 7, I would not have considered those acts as underlying acts of persecution, unless a connection was proven with another crime. It is also for this reason that I have not considered acts such as the prohibition against praying at mausoleums (Prosecution Final Brief, para. 499) as part of my assessment on the scope of the crime of persecution.
[179] *See* paragraph 1530 of the Trial Judgment.
[180] *See* paragraph 1532 of the Trial Judgment.
[181] *See* paragraph 1535 of the Trial Judgment.
[182] *See* section II.A.2 above.

in detention or captivity, targeted on the basis of any grounds, as required under the third element of the crime of persecution.

102. I am also of the view that the rules on the dress code were not committed 'in connection with' a crime or an Article 7(1) act for which Mr Al Hassan is responsible. For these reasons, I would have refrained from considering the acts of detention of women by the *Hesbah* under Mohammed Moussa.

103. Accordingly, I consider, albeit with a different scope, that a crime of persecution on religious grounds was committed in the present case. I do not consider it established that Ansar Dine/AQIM members targeted the civilian population on gender grounds. In my view, while the rules and prohibitions imposed did affect women and girls to a great extent, the facts do not support a specific discriminatory intent beyond the targeting on religious grounds, with respect to acts that were perpetrated in connection with a crime or an Article 7(1) act.

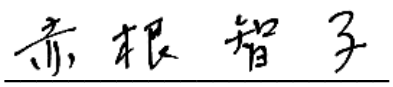
VII. CONCLUSION

104. For reasons set out above, while I form a Majority in finding Mr Al Hassan guilty with respect to Counts 2-4, 6 and 13, I respectfully disagree with the scope of Mr Al Hassan's criminal responsibility. With respect to Counts 2 and 4-6, for different reasons to Judge Mindua, I do not consider Mr Al Hassan responsible with respect to the following incidents: Fadimata Mint Lilli (P-0547), P-0570, P-0636, Azahara Abdou (P-1134), Salamata Warnamougrez (P-1710), Hady Aguissa (P-1711); P-1712; Mahmud Bin al-Mustafa; Boune Ould Hassan; Ali al-Haji and 'Ali Shayban; 'Abdullah Kuni; Abou-Bakr Soumboulou; and Dawoud Oulale. In relation to Mr Al Hassan's responsibility under Article 25(3)(c), while I form a Majority in finding Mr Al Hassan not criminally responsible in relation to Count 6, I do so for different reasons in that I do not consider that Mr Al Hassan had the requisite mental element with respect to: Ibrahim bin Al-Husayn; Al-Husayn Bin 'Umar and Halimah Bint Muhammad; Al-Khayr Bin-Sidi; Moussa Ben Mohamed el-Joumaa or Muhammad Musa Muhammad al-Jam'at, 'Abdu, 'Ali al-Jaw and Adulahi; Abdelkarim Ascofare or 'Abd-al-Karim Iskufari; Muhammad Bin Musa; Muhammad Walad, Aghli Asudh and Arjili Bin Aman; Yahya Bin-Muhammad or his companion; and El-Khamis Bin-el-Sabt.

105. Further, while I form a Majority in finding Mr Al Hassan not guilty with respect to the crimes charged under Counts 8-12 in relation to the forced marriage victims, I do so for different reasons, as in my view, they lack the necessary nexus (with respect to Counts 8-9 and 11),[183] the relevant crimes were not part of the common purpose,[184] and Mr Al Hassan made no contribution to these crimes.[185]

106. I emphasise that I have joined my colleagues in the factual findings concerning P-0520, P-0602, P-0610, P-0538, P-0636, P-0570 and Fadimata Mint Lilli (P-0547) and that I am accordingly convinced to the requisite standard that these individuals were victims of acts of rape, forced marriage and sexual slavery.[186] I am aware that, in these circumstances, the Majority's conclusion that Mr Al Hassan is not guilty for the crimes charged under Counts 8-12 will be received with disappointment by the victims. However, notwithstanding that remedying the harm suffered by victims is an important objective under the Statute, this cannot be a reason to deviate from the fundamental principles of criminal law, including the presumption of innocence of the accused until proven otherwise by evidence and the principle of *in dubio pro reo*.[187] While I am truly sympathetic about the suffering of these individuals, absent evidence proving the accused's culpable conduct beyond reasonable doubt,[188] I am of the opinion that Mr Al Hassan cannot be found guilty for these crimes.

Done in English. A French translation will be prepared, but the English version remains authoritative.



Judge Tomoko Akane

Dated this Wednesday, 26 June 2024

At The Hague, The Netherlands

[183] *See* section II.B above.
[184] *See* sections II.A.1.ii and II.A.1.iii above.
[185] *See* section II.A.2.ii above.
[186] For reasons mentioned in the Trial Judgment, I am unable to join my colleagues in the factual findings concerning P-1134 and P-1162. *See* footnotes 2790, 2792-3793, 2810-2811, 3279 and 3289 of the Trial Judgment.
[187] *See also* paragraph 6 above.
[188] *See* section II-A-1 of the Trial Judgment.